



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

AUG 31 2004

John F. O'Grady, DDS
99 Seventh Street
Garden City, NY 11530-5730

RE: MUR 5524
John F. O'Grady

Dear Dr. O'Grady:

On August 27, 2004, the Federal Election Commission found that there is reason to believe you violated 2 U.S.C. § 441a(a)(1)(A), a provision of the Federal Election Campaign Act of 1971, as amended ("the Act"). The Factual and Legal Analysis, which formed a basis for the Commission's finding, is attached for your information.

You may submit any factual or legal materials that you believe are relevant to the Commission's consideration of this matter. Please submit such materials to the General Counsel's Office within 15 days of your receipt of this letter. Where appropriate, statements should be submitted under oath. In the absence of additional information, the Commission may find probable cause to believe that a violation has occurred|

Requests for extensions of time will not be routinely granted. Requests must be made in writing at least five days prior to the due date of the response and specific good-cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days.

If you intend to be represented by counsel in this matter, please advise the Commission by completing the enclosed form stating the name, address, and telephone number of such counsel, and authorizing such counsel to receive any notifications and other communications from the Commission.

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This matter will remain confidential in accordance with 2 U.S.C. §§ 437g(a)(4)(B) and 437g(a)(12)(A), unless you notify the Commission in writing that you wish the investigation to be made public.

For your information, we have also enclosed a brief description of the Commission's procedures for handling possible violations of the Act. If you have any questions, please contact Daniel G. Pinegar, the staff attorney assigned to this matter, at (202) 694-1650.

Sincerely,



Ellen L. Weintraub
Vice Chair

Enclosures:
Factual and Legal Analysis
Designation of Counsel Form
Procedures

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FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

FACTUAL AND LEGAL ANALYSIS

RESPONDENT: John F. O'Grady

MUR: 5524

I. GENERATION OF MATTER

This case was generated based on information ascertained by the Federal Election Commission ("the Commission") in the normal course of carrying out its supervisory responsibilities. *See* 2 U.S.C. § 437g(a)(2).

II. FACTUAL AND LEGAL ANALYSIS¹

Dr. Marilyn O'Grady ran for a U.S. House of Representatives seat in New York's 4th Congressional district in 2002. She won her September 10, 2002 primary election, but lost to Carolyn McCarthy in the general election on November 5, 2002. O'Grady's authorized political committee was Friends of Marilyn O'Grady ("the Committee").

The Federal Election Campaign Act of 1971, as amended, prohibits individuals from contributing more than \$1,000 for each election to a federal candidate or candidate committee. 2 U.S.C. § 441a(a)(1)(A). This limitation applies even to family members or spouses. *See Buckley v. Valeo*, 424 U.S. 1, 51, n.57 (1976) ("[T]he immediate family of any candidate shall be subject to the contribution limitations established. . . . The immediate family member would be

¹ All of the facts recounted in this matter occurred prior to the effective date of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. 107-155, 116 Stat. 81 (2002). Accordingly, unless specifically noted to the contrary, all citations to the Act are prior to the effective date of BCRA and all citations to the Commission's regulations are to the 2002 edition of Title 11, Code of Federal Regulations, published prior to the Commission's promulgation of any regulations under BCRA.

permitted merely to make contributions to the candidate in amounts not greater than \$1,000 for each election involved.”). A loan that exceeds the contribution limitations of 2 U.S.C. § 441a and 11 C.F.R. § 110 is unlawful whether or not it is repaid. 11 C.F.R. § 100.7(a)(1)(i)(A).

Candidates and political committees are similarly prohibited from knowingly accepting contributions in excess of the limitations of section 441a. 2 U.S.C. § 441a(f). When a committee receives an excessive contribution, the committee must either refund the excessive portion of the contribution or the contributor must provide the committee with a redesignation or reattribution, both within 60 days after receipt of the contribution. 11 C.F.R. §§ 103.3(b)(3) and 110.1(b)(3)(i).

The Commission authorized an audit of the Committee pursuant to 2 U.S.C. § 438(b), covering the period of January 15, 2002 – December 31, 2002.² The Commission approved of the Final Audit Report on March 22, 2004. The Final Audit Report included a finding that the Committee received \$25,000 in contributions from the candidate’s spouse, Dr. John F. O’Grady, in the form of two loans from a business checking account:

Loans		
Lender	Date Incurred	Amount
<i>Dr. John F. O’Grady</i>	10/04/02	\$ 15,000
<i>Dr. John F. O’Grady</i>	10/21/02	\$ 10,000
TOTAL		\$ 25,000

The checks were imprinted only with the name and credentials of Dr. John O’Grady as the account holder. The Committee reported these loans as made by the candidate from her

² The Commission voted to undertake the audit on April 22, 2003 and fieldwork in Garden City, NY was conducted July 28, 2003 to August 8, 2003.

1 "personal funds" and never reported them as contributions or loans from Dr. John O'Grady. *See*
2 2002 Amended (2/13/04) 12-Day Pre-General Election Report at 42; 2002 Amended (2/13/04)
3 Post-General Report at 53; 11 C.F.R. § 110.10(b) (defining personal funds). During the audit the
4 candidate stated that this account was maintained for the dental practice operated by her spouse,
5 but claimed that she had a legal right to these loans under New York marital property laws as a
6 joint asset.³

7 At the exit conference, the audit staff requested documentation to support the candidate's
8 claim that the loan proceeds were her personal funds within the meaning of 11 C.F.R.
9 § 110.10(b)(1). Subsequent to the exit conference, the candidate stated that she had attempted to
10 obtain account information from the bank but was told that retrieving the records would be time
11 consuming because the account was established long ago and before the bank changed
12 ownership. The candidate provided a notarized letter from her spouse explaining that since the
13 account represents income from his dental practice and is reportable as their combined income
14 for federal taxes, it was their understanding that the funds were a joint asset and thereby
15 permissible for use in the campaign.⁴ However, absent documentation to support the candidate's
16 claim that the loans were from her "personal funds," and based on the checks themselves and the

³ Applicable New York marital property law does not support the candidate's contention that the funds in her spouse's account were joint assets. *See* N.Y. Dom. Rel. Law § 236; *In re Anjum*, 288 B.R. 72, 76 (Bankr. S.D.N.Y. 2003); *In re Lefrak*, 223 B.R. 431, 439 (Bankr. S.D.N.Y. 1998); *Leibowits v. Leibowits*, 93 A.D.2d 535, 549 (2d Dept. 1983). Furthermore, even if the funds used to make the loans did constitute "marital property" under New York law, Marilyn O'Grady would not have any *vested* right to such property, if it were titled in her husband's name, until the marriage is legally dissolved. *Id.*

⁴ A candidate may use her "personal funds" to make a loan to her campaign committee if she had (a) legal right of access to or control over and (b) legal and rightful title or an equitable interest, as determined by "applicable state law." 11 C.F.R. § 110.10(b)(1). Accordingly, federal tax treatment of funds is not relevant. While the candidate may have an unvested equitable interest under (b), she still has no immediate legal right of access to or control over those funds as required under (a) and defined by state law. *See* footnote 3, *supra*. Therefore, she may not treat them as her "personal funds" pursuant to the Act and the Commission's regulations.

1 bank statements, the interim audit report recommended that the Committee refund \$23,000 to the
2 candidate's spouse.

3 In response to the recommendation in the interim audit report, the candidate reiterated her
4 claim that the funds were her personal assets since they were reportable as combined income for
5 federal income tax purposes. Nevertheless, following the audit, because the Committee lacked
6 sufficient funds to refund the excessive contribution, the candidate made a loan in the amount of
7 \$23,000 from a joint checking account with her spouse to the Committee. Thereafter, the
8 Committee made a refund in the same amount to the candidate's spouse.

9 Therefore, the Commission finds that there is reason to believe that John F. O'Grady
10 violated 2 U.S.C. § 441a(a)(1)(A) by making excessive contributions totaling \$23,000 (\$25,000
11 less the pre-BCRA legal contribution of \$1,000 for the primary and general elections).

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